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No. 86-1760

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In the Supreme Court of the United States

OCTOBER TERM, 1986

CARPENTERS LOCAL 608, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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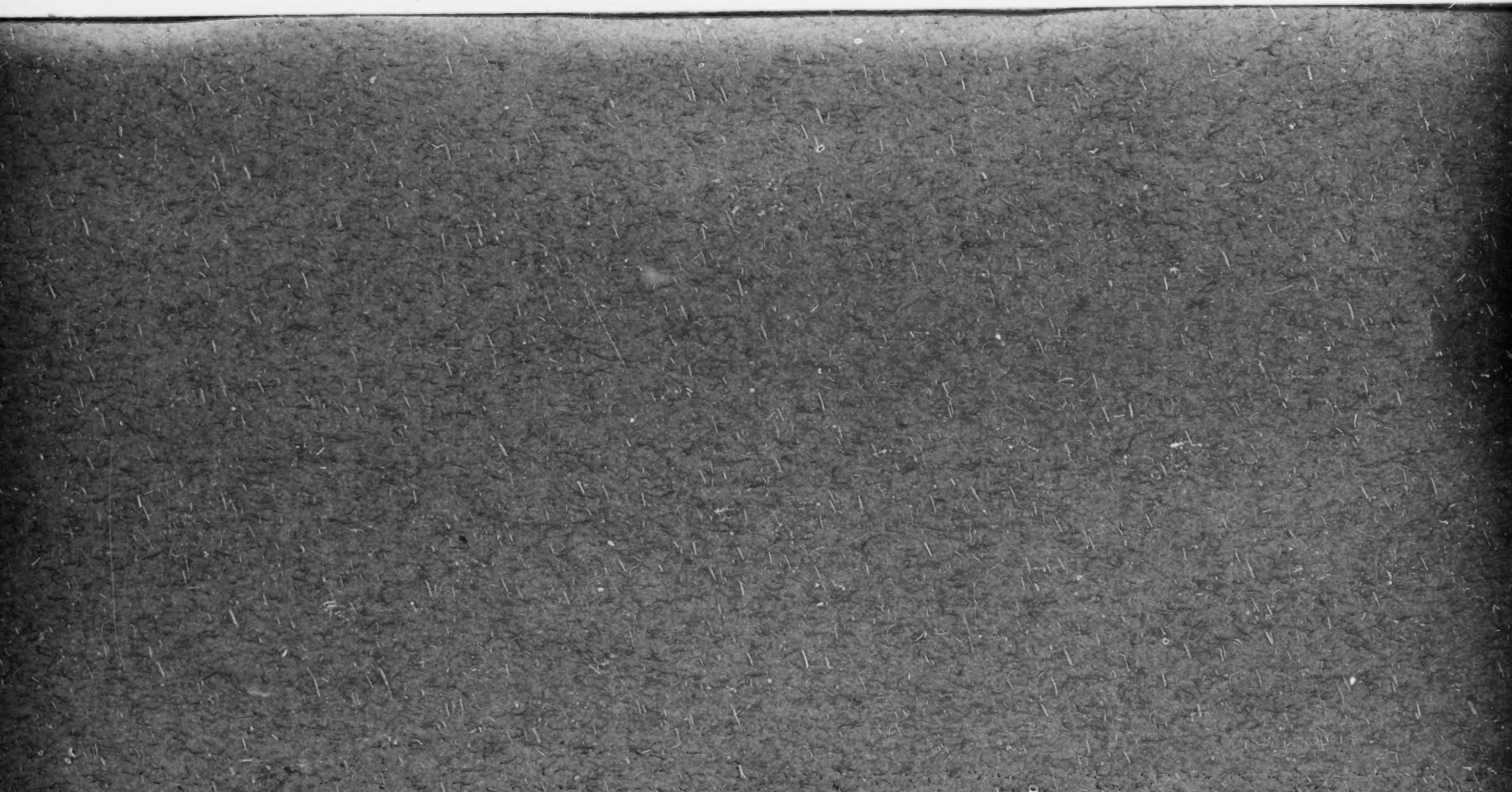

QUESTION PRESENTED

Whether the NLRB, having found that a union improperly denied certain employees access to information related to their claim that the union was discriminating against them in job referrals, could order the union to permit those employees to inspect and duplicate hiring hall records, including the names, addresses, and telephone numbers of persons using the hiring hall during a six-month period.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A11) is reported at 811 F.2d 149. The decision and order of the National Labor Relations Board (Pet. App. A12-A16), and the decision of the administrative law judge (Pet. App. A17-A59), are reported at 279 N.L.R.B. No. 99.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1987. A timely petition for rehearing was denied on March 4, 1987 (Pet. App. A1). The petition for a writ of certiorari was filed on May 1, 1987. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to collective bargaining agreements between the District Council of New York of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, of which petitioner is a member, and various associations of employers engaged in the construction and building trades in New York City, petitioner operates an exclusive hiring or referral hall (Pet. App. A12 n.1, A19-A20). Under the agreements, employers must fill the first opening for a carpenter on a jobsite, and every second opening thereafter, through the hiring hall (*id.* at A20). Petitioner, in turn, must "establish and maintain an open employment list for the employment of competent workmen" (*id.* at A20-A21). Since 1979,[1] petitioner has complied with this requirement by use of a call-in system under which individuals seeking work, and employers desiring workers, call the hiring hall and petitioner then refers qualified workers to particular jobs in the order in which the workers have called in (*id.* at A4, A21-A23). Approximately 700-800 of petitioner's over 3,000 members use this referral system in the course of a year (*id.* at A23).

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[1] Prior to 1979, referrals were made on the basis of daily "shape-ups" at petitioner's offices (Pet. App. A21).

At nearly every monthly union meeting from May through December 1982, petitioner's officers stated either that the membership was 100% employed or that work opportunities were plentiful (Pet. App. A27). During that same period, however, three of petitioner's members—John Harte, Frank McMurray, and Eugene Clarke—did not receive prompt referrals (*id.* at A28). Harte, McMurray, and Clarke became concerned that petitioner was discriminating against them because of their dissident union activities (*id.* at A4-A5, A24-A27).[2] They accordingly requested on several occasions that they be allowed to examine the hiring hall's referral records (*id.* at A5, A28-A31). Petitioner's business manager, Paschal McGuiness, refused their various requests without explanation, although he had previously stated that the hiring hall maintained a job list and that any member could see it (*id.* at A5, A28-A31).

In February 1983, after consulting with an attorney, Harte and McMurray sent letters to McGuiness indicating that they needed the names, addresses, and phone numbers of persons receiving referrals during the preceding six months in order that they might determine whether they had been discriminated against in job referrals (Pet. App. A31, A42, A46 n.32). McGuiness agreed to meet with them to discuss their request (*id.* at A32), but, on meeting with them, again refused without explanation to produce the requested information; he would only allow Harte and McMurray to examine their individual work rec-

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[2] Harte, McMurray, and Clarke were the founders of a group of dissident union members (Pet. App. A24). In addition, each had been involved in unsuccessful election campaigns against petitioner's incumbent officers and had been critical of many of petitioner's policies (*id.* at A24-A26).

ords (*ibid.*). In May 1983, when Clarke expressed concern that petitioner had interfered with his efforts to obtain a job, McGuiness again without explanation refused him access to the job list (*id.* at A33, A34, A43).

2. In response to unfair labor practice charges filed by Harte, McMurray, and Clarke, the General Counsel of the National Labor Relations Board (NLRB) issued a complaint alleging, inter alia, that petitioner had violated its duty of fair representation, and thus Section 8(b)(1)(A) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(1)(A), by refusing to permit Harte, McMurray, and Clarke to inspect the hiring hall records in connection with their discrimination claims (Pet. App. A5, A18). An administrative law judge (ALJ) found in the General Counsel's favor, and the NLRB affirmed (*id.* at A12-A16, A17-A57).

a. The ALJ "credit[ed] the testimony of the charging parties that they requested to see the job lists because they reasonably believed that they were being discriminated against by [petitioner] in the operation of its hiring hall" (Pet. App. A43). He found that "nearly all of the requests were made[] when the charging parties were unemployed and awaiting referral from the hall, while at the same time [petitioner's] officials were announcing 100% or plentiful employment among the membership" (*ibid.*). The ALJ rejected petitioner's contention that "the real motive for [the employees'] request for hiring hall information, was to obtain an additional outlet for their dissemination of campaign literature," noting that the employees' initial requests antedated such campaign activity and that there was no evidence connecting that campaign activity with any of

the other information requests (*id.* at A44-A45, A45-A46).

The ALJ further found that the employees' request for hiring hall records was a reasonable one (Pet. App. A47-A52). He noted that the "charging parties had been denied access to the job lists for months without explanation by [petitioner]," that they had "credibly testified that they wished to be able to verify whatever information they might be given from [petitioner's] records[,]" and that they needed this information to determine "whether they were being discriminated against in assignments with respect to job duration" (*id.* at A47, A48).

The ALJ rejected petitioner's claim that Section 401(c) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 481(c),[3] barred the disclosure of such information (Pet. App. A49). He observed that Section 401(c) "merely regulates intra-union election campaigns in connection with [the] disclosure of membership lists to candidates, and even at that, does not prohibit a union from granting more extensive disclosure than the statute requires" (*id.* at A49). He further noted

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[3] Section 401(c) of the LMRDA provides (29 U.S.C. 481(c)) that "[e]very * * * labor organization, and its officers, shall be under a duty * * * to comply with all reasonable requests of any candidate [for office in that labor organization] to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing * * * and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members * * *. Every bona fide candidate shall have the right, once within 30 days prior to an election[,] * * * to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment * * *."

that "the intent of the statute is to provide a minimum amount of disclosure in an election campaign, not to prevent a Union from doing so, or authorizing a Union to decline to do so in appropriate [circumstances]" (*id.* at A49-A50).

Finally, the ALJ found "entirely specious and pretextual" petitioner's claim that it needed to maintain the confidentiality of the phone numbers and addresses of those who used the hiring hall (Pet. App. A52). He found no credible evidence that petitioner had a policy of keeping such information confidential (*ibid.*). Nor could he find any evidence "that the alleged policy of confidentiality was disseminated to employees, or that any employees sought to have the information kept confidential, or that the employees had an expectation that this information would be kept confidential" (*id.* at A54 (footnote omitted)). Rather, he found that the assertion of confidentiality "was an afterthought conjured up by [petitioner] after the fact to attempt to justify its discriminatory actions against the charging parties" (*id.* at A53).

b. The NLRB adopted the findings and conclusions of the ALJ (Pet. App. A12). Accordingly, it ordered petitioner to cease and desist from arbitrarily denying employees information concerning the operation of the hiring hall (*id.* at A13). And it ordered petitioner to honor the information requests made by Harte, McMurray, and Clarke, including but not limited to the written requests made in February 1983 and, in that connection, to permit them at their own cost to inspect, review, and copy the requested names, addresses, and telephone numbers of persons using the hiring hall during the pertinent period (*ibid.*).

3. The court of appeals affirmed the NLRB's decision and enforced its order (Pet. App. A1-A11).

It noted that "[a] union breaches its duty of fair representation in violation of section 8(b)(1)(A) of the NLRA when it arbitrarily denies a member's request for job referral information, when that request is reasonably directed towards ascertaining whether the member has been fairly treated with respect to job obtaining referrals" (*id.* at A5-A6, citing *NLRB* v. *Local 139, Int'l Union of Operating Engineers*, 796 F.2d 985, 992-994 (7th Cir. 1986)). It found that "there is 'substantial evidence on the record considered as a whole' to support the [NLRB's] finding that the dissidents had a good faith basis for requesting the hiring hall records" (Pet. App. A8). And it likewise found substantial evidence supporting the NLRB's finding that petitioner "did not consider this information to be confidential" (*id.* at A9).

The court rejected petitioner's argument that "the dissidents, through their requests for hiring hall records, should not be allowed to obtain information concerning the membership that they are not otherwise entitled to receive" under Section 401(c) of the LMRDA (Pet. App. A9). It reasoned that the LMRDA "does not prohibit a union from granting more extensive disclosure than the minimum the statute requires" (*id.* at A10). And, the court noted, "[i]t would be anomalous to conclude that * * * a statute designed to protect union members from potential abuse by union officials * * * prohibits a union from disclosing names, addresses and telephone numbers * * * where, as here, such information is necessary to determine whether the union has violated a worker's rights" (*ibid.*).

Finally, the court rejected "the union's contention that the portion of the [NLRB's] order permitting the dissidents to copy addresses and telephone num-

bers of members using the hiring hall was overbroad" (Pet. App. A11). It noted that "[t]he dissidents will need this information to verify the accuracy of the hiring hall records" (*ibid.*). And, it concluded, "[a]lthough it is conceivable * * * that the [NLRB] could have provided the same relief and kept the information confidential by having union employees check the information, considering the animus between the union and the dissidents in this case[,] we cannot say that the [NLRB] abused its broad [remedial] discretion" (*ibid.*).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner first contends (Pet. 7-8) that the decision below allows dissident employees to misuse confidential membership information. This contention is specious. The NLRB adopted the findings of the ALJ, which were based on substantial testimony, that Harte, McMurray, and Clarke sought the hiring hall information because they believed petitioner had discriminated against them in job referrals and that there was no evidence that petitioner had a policy of keeping such information confidential. These findings, affirmed by the court below, are correct and in any event do not merit this Court's review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

2. Petitioner next argues (Pet. 9-15) that, by permitting the three dissident employees to copy the names, addresses, and phone numbers of hiring hall users, the decision below conflicts with Section 401

(c) of the LMRDA which mandates disclosure of union membership lists in certain circumstances and which, petitioner contends, embodies a congressional policy against additional disclosure of such lists. This contention is also wrong.

To begin with, this case does not concern the union's membership list. The NLRB ordered petitioner to make available the names, addresses, and phone numbers *not* of its members but of persons using its hiring hall during a six-month period. Hiring hall records are not the same as union membership lists. They contain different information and could cover entirely different groups of employees. Indeed, only approximately 700-800 of petitioner's over 3000 members use the hiring hall. See Pet. App. A23.

In any event, Section 401(c) does not embody any policy against disclosure. Section 401 merely provides that, in certain circumstances, a "bona fide candidate [for office in a labor union] shall have the right * * * to inspect a list containing the names and last known addresses of all members of the labor organization * * *" (29 U.S.C. 481(c)). Nothing in the language or legislative history of this affirmative mandate suggests that Congress simultaneously intended to "prohibit a union from granting more extensive disclosure than the minimum the statute requires" (Pet. App. A10).[4] Indeed, as the court below noted (*ibid.*), "[i]t would be anomalous to conclude that the LMRDA, a

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[4] The legislative history on which petitioner relies (Pet. 11-14) consistently refers to intra-union "elections" and "election procedures." These references make clear that Congress crafted Section 401(c) to respond to the needs of candidates for union office. Nothing in this legislative history suggests that Congress intended Section 401(c) otherwise to preclude disclosure of union membership information.

statute designed to protect union members from potential abuse by union officials, * * * prohibits a union from disclosing names, addresses and telephone numbers of union members where, as here, such information is necessary to determine whether the union has violated a worker's rights."

In fact, Section 603 of the LMRDA states (29 U.S.C. 523) that, "[e]xcept as explicitly provided to the contrary," nothing contained in the LMRDA shall "reduce or limit the responsibilities of any labor organization * * * under any other Federal law * * *[,] take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law[,] * * * or to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended." Section 401 clearly contains no provision prohibiting a disclosure of information deemed appropriate by the NLRB to remedy a union's unfair labor practice. Thus, the LMRDA cannot properly be read in the manner that petitioner suggests.

3. Finally, petitioner errs in suggesting (Pet. 16-17) that the NLRB's remedial order should be modified to prevent union dissidents from misusing lists of union members' names, addresses, and telephone numbers. For one thing, the NLRB, adopting the findings of the ALJ, determined that these employees had no such intention. See Pet. App. A12, A43-A48. Moreover, as the court below noted (*id.* at A6-A7), even if these employees did intend to use the information for electioneering purposes as well for investigating their treatment in job referrals, the NLRB is under no obligation to stop them. Cf. *NLRB* v. *Leonard B. Herbert & Co.*, 696 F.2d 1120, 1126 (5th Cir.) (employer cannot deny a union's request for

information related to its role as bargaining agent merely because the union may also use the information for organizational or campaign purposes), cert. denied, 464 U.S. 817 (1983); *Utica Observer-Dispatch, Inc.* v. *NLRB*, 229 F.2d 575, 577 (2d Cir. 1956) (same); *Columbus Maintenance & Service Co.*, 269 N.L.R.B. 198, 198 n.1 (1984) (same); *Associated General Contractors*, 242 N.L.R.B. 891, 893-894 (1979) (same). The NLRB is entitled to impose all measures that, in the exercise of its broad remedial discretion, it deems necessary to promote the purposes of the NLRA. See *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-263 (1969); *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540-541 (1943). And, as the court below noted (Pet. App. A11), "considering the animus between the union and the dissidents in this case[,] [it] cannot [be said] that the [NLRB] abused its broad discretion" here.[5]

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[5] Contrary to petitioner's suggestion (Pet. 16), the court below did not defer to the NLRB's interpretation of the LMRDA. Rather, it deferred to the NLRB's determination that these measures were necessary to remedy a violation of the NLRA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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